

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

APR 7 2014

OFFICE OF
MANAGING DIRECTOR

Al Gencarella
Stratophone, LLC
67 Green Meadow Blvd.
Middletown, NJ 07748

Mike Carper
Skytel Spectrum, LLC
710 Route 46 East
Fairfield, NJ 07004

Licensee/Applicant: **Stratophone, LLC and
SkyTel Spectrum, LLC**

Request for Waiver or, in the Alternative,
Clarification and Deferral of Application Filing
Fees For Stratophone (sic), LLC and Skytel
Spectrum, LLC

Disposition: Denied (47 U.S.C. § 158; 47 C.F.R. §§
1.925, 1.1119, 1.1166(e))

Stations: N/A

Date of Request: Aug. 5, 2013

Fee: Application Fees (Air-Ground Radiotelephone
Automated Service)

Fee Control No: RROG-13-00015316

Dear Messrs. Gencarella and Carper:

This responds to Petitioners' Request for Waiver or, in the Alternative, Clarification and Deferral of Application Filing Fees for Strat[o]phone, LLC and SkyTel Spectrum, LLC (*Request*)¹ pertaining to its future applications for replacement frequencies and new channels in the Air-Ground Radiotelephone Automated Service (AGRAS) under Part 22, Subpart G of the

¹ Request for Waiver or, in the Alternative, Clarification and Deferral of Application Filing Fees for Stratophone [sic], LLC and SkyTel Spectrum, LLC from Al Gencarella, Stratophone, LLC, 67 Green Meadow Blvd., Middletown, NJ 07748 and Mike Carper, Skytel Spectrum, LLC, 710 Route 46 East, Fairfield, NJ 07004 to The Attention of the Managing Director (Aug. 5, 2013) (*Request*) with Exhibit A, Letter from Mark Stephens, Chief Financial Officer, FCC, Washington, DC 20554 to Doane F. Kiechel, Esq., 4005 Garrison St., N.W., Washington, DC 20016 and Liz Sachs, Esq., Lukas, Nace, Gutierrez & Sachs, LP, 8300 Greensboro Dr., Ste 1200, McClean, VA 22102 (Mar. 30, 2011) (*Ex A*), Exhibit B, Spreadsheet (*Ex B*), Exhibit C, Skytel Spectrum/Stratophone-AGRAS, Combining Income Statements for the 12 Months Ended December 31, 2011 & 2012 (*Ex C1*), Skytel Spectrum/Stratophone-AGRAS, Balance Sheets for the 12 Months Ended December 31, 2011 & 2012 (*Ex C2*). L.

Commission's rules.² Petitioners "intend to file [those] applications in the near future, consistent with a waiver of fees granted ... on the basis of their compelling showing of financial hardship in just this same context two years ago."³ Petitioners assert that due to unforeseen developments and delays, they must seek further fee relief to complete the application process. In the alternative, Petitioners request clarification that the "fees for the filing of applications for new channels in the AGRAS service are to be calculated on a per transmitter basis (rather than a per channel basis)."⁴ Finally, Petitioners request that we defer payment of the filing fees until we reach a decision on the petition. For the reasons set forth below, we deny the *Request* and affirm that the relevant application fee required is on a per channel basis.

Background

On February 24, 2009, Petitioners requested a waiver of 47 C.F.R. §§ 22.815 and 22.817, the Commission's rules governing the general aviation air-ground radiotelephone service.⁵ Specifically, section 22.817⁶ bars a carrier from (i) applying for more than one ground station communication channel at a time for a particular service area, and (ii) holding more than six authorizations for ground station communication channels in the same service area.⁷ In that waiver request, Petitioners asserted that the waivers would allow for the efficient use of all spectrum otherwise restricted by the small bandwidth allotment for the ground station and mobile unit allocation.⁸ Petitioners presented the issue whether they could include multiple channels for a given site on a single application and pay a single application fee for each bundled application. The Commission granted the waiver that was conditioned on Petitioners submitting all of its applications within six months of July 2, 2010, the release date of the decision.⁹ Additionally, the *Licensing Waiver* Order provided that unless the fees were waived, Petitioners were required to pay the normal per channel filing fee, notwithstanding the requisite inclusion of multiple channels on a single application.¹⁰

On December 30, 2010, Petitioners filed 45 applications¹¹ for AGRAS Radio Service Authorizations.¹² Petitioners paid \$42,350.00 in application fees on the basis of "one fee per frequency," and simultaneously petitioned for a waiver based on "financial hardship."¹³ In its 2010 request, Petitioners asserted SkyTel suffered a loss in 2010, SkyTel had no employees, it

² *Request* at 1.

³ *Id.*

⁴ *Id.*; see also Wireless Telecommunications Bureau Fee Filing Guide, Universal Licensing System, August 2013, 2013 WL 4498711 (*Fee Filing Guide*) (Part 22, Paging and Radiotelephone Service).

⁵ Joint Request by Stratophone, LLC and SkyTel Spectrum, LLC for Waiver of Certain Air-to-Ground Radiotelephone Service Licensing Rules for General Aviation, *Order*, 25 FCC Rcd 8581 (2010) (*Licensing Waiver*).

⁶ 47 C.F.R. § 22.817 provides, "The general policy of the FCC is to assign one ground station communication channel in an area to a carrier per application cycle, up to a maximum of six ... channels per area. That is, a carrier must apply for one ... channel, receive the authorization, construct the station, and notify the FCC of commencement of service before applying for an additional ... channel in that area."

⁷ *Id.* at 8581, ¶ 1.

⁸ *Id.*, at 8584, ¶ 6.

⁹ *Licensing Waiver*.

¹⁰ *Id.* n. 64.

¹¹ *Id.* at 2. The applications included six applications for new service and 39 major modifications.

¹² *Request* at 2; see *Licensing Waiver* at 8581, 8589.

¹³ *Request* at 2-3.

paid no salaries, and took no depreciation on its equipment (because it lacked value); furthermore, Petitioners asserted that Stratophone had two uncompensated officers and two part-time employees each of whom received \$7,380.00 for administrative work. In response to that petition, we found that Petitioners showed it suffered financial losses for calendar year 2010, and that Stratophone's financial loss was "only partially offset by depreciation and amortization deductions." On March 30, 2011, we granted the petition for waiver, and refunded the payment.¹⁴

Petitioners now assert that circumstances require additional applications, and that their continuing financial hardship, which has not changed in two years, warrants a new waiver of the fees. They urge us to conclude that they meet our standard at 47 C.F.R. § 1.1119¹⁵ of demonstrating "good cause" and that the "waiver or deferral of the fee w[ill] promote the public interest."¹⁶ In addition to asserting¹⁷ that that Petitioners meet the standard at sections 1.1119 and 1.1166(e),¹⁸ Petitioners assert they meet the standard at 47 C.F.R. § 1.925,¹⁹ because (a) the underlying purpose of the rule would not be served or it would be frustrated by application of the rule to the instant case, and that the grant of the waiver would be in the public interest, or (b) in view of the unique or unusual factual circumstances of the case at issue, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

Petitioners also assert unforeseen developments prevented granting of the earlier filed applications, and, now, those developments require amendments to the pending applications and submission of additional applications. Thus, Petitioners assert they anticipate a new submission of 381 applications each with a \$395.00 fee or a total of \$150,495.00. Petitioners claim the financial losses they suffered in 2010,²⁰ which was a ground on which we approved a prior request for waiver, continued through calendar years 2011 and 2012.

¹⁴ *Request, Ex A.*

¹⁵ 47 C.F.R. § 1.1119 (a) provides, "The fees established by this subpart may be waived or deferred in specific instances where good cause is shown and where waiver or deferral of the fee would promote the public interest."

¹⁶ *Request* at 5.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.1166(e) provides, "Petitions for waiver of a fee based on financial hardship, ... will not be granted, even if otherwise consistent with Commission policy, to the extent that the total regulatory and application fees for which waiver is sought exceeds \$500,000 in any fiscal year, In computing this amount, the amounts owed by an entity and its subsidiaries and other affiliated entities will be aggregated."

¹⁹ 47 C.F.R. § 1.925 provides,

(a) *Waiver requests generally.* The Commission may waive specific requirements of the rules on its own motion or upon request. ... (2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found. (3) The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

²⁰ *Request* at 7.

Petitioners assert they meet the good cause prong of our standard through a compelling showing of financial hardship, which they have demonstrated through their financial information showing (a) "declining revenues, further financial losses and deteriorating cash flows"²¹ since 2010, (b) no payments of funds or compensation to principals, and (c) either no claimed deductions for depreciation or amortization (e.g., SkyTel) or no amounts claimed would fully offset financial losses (e.g., Stratophone).²²

Next, Petitioners assert that a waiver will serve the public interest because (a) the general aviation transportation segment needs a modern wireless telecommunications system,²³ (b) the current system has limited capacity and functionality, thus it must be upgraded,²⁴ (c) the initial plan and design must be revised to include more sites, more channels, and more applications with fees,²⁵ (d) large fees will "make it exceedingly difficult ... to raise capital necessary to apply for all available frequencies in an efficient and cost-effective manner,"²⁶ and (e) without a waiver, Petitioners "will need to proceed on a more incremental schedule, filing applications for as less comprehensive set of channels, resulting in delays, inefficiencies and, ultimately, increased costs in deployment of a nationwide network with adequate capacity to enable lower rates for usage."²⁷ Thus, Petitioners assert, "[a]bsent fee relief, the underlying purposes of the *Licensing Waiver* will be thwarted."²⁸ Moreover, Petitioners contend that the older AGRAS system pricing of "several dollars per minute" and system limitations have resulted in an antiquated system that does not anticipate or allow new subscribers or provide an incentive for improving the infrastructure. The system must, in Petitioners' view, be rebuilt, and to "justify the cost of this rebuild, the new system must be capable of providing adequate capacity to enable cost effective pricing that will encourage subscriptions to create the revenue stream needed to recover an investment in the new system."²⁹

In the alternative, Petitioners request clarification whether the "statutory Schedule of Application Fees" requires a filing fee per channel or, as Petitioners assert, a fee that is "calculated on a per transmitter rather than a per frequency basis."³⁰ Petitioners assert the application fee "should be calculated on a per transmitter rather than per frequency basis" because (a) the Fee Filing Guide does not include a separate section for Air-Ground Radiotelephone service and (b) WTB staff advised that the fees for Air-Ground are the same as those for Part 22 Paging and Radiotelephone Service," which are on a per transmitter basis.³¹ Moreover, Petitioners assert that within the Paging and Radiotelephone Service examples of per location/frequency, per call sign, and differences in fees for first and additional call signs are an indicative showing that Congress and the Commission "have expressed no intention to assess a

²¹ Request at 7.

²² *Id.*

²³ Request at 7.

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 9.

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.*

separate fee per frequency," rather the fee should be a single per Transmitter fee.³² Furthermore, Petitioners assert the legislative history leaves no doubt that "per transmitter" represents a separate computational methodology from "per frequency," which should not be applied as the basis for assessing the filing fees.³³

Finally, Petitioners request that we defer payment of the fees until this *Request* is resolved and a period of not longer than six months.

Discussion

Applicants seeking a waiver of the required application fees based on financial hardship must demonstrate both "good cause" and that the "waiver or deferral of the fee would promote the public interest."³⁴ In that regard, we consider whether in any specific instance special circumstances warrant a deviation from the general rule, and second whether the deviation serves the public interest.³⁵ The Commission has mandated that petitioners seeking a waiver of the statutorily required fees at either section 8 or section 9 of the Communications Act of 1934 must carry the burden of showing "extraordinary and compelling circumstances" outweighing the public interest in recouping the cost of the Commission's regulatory services from a particular regulatee.³⁶ Generally, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested. As we discuss, below, Petitioners failed to demonstrate that a waiver is appropriate.

³² *Id.* at 11

³³ *Id.* at 12.

³⁴ 47 U.S.C. § 158(d)(2) ("The Commission may waive or defer payment of an charge in any specific instance for good cause shown, where such action would promote the public interest."); 47 C.F.R. 1.1119 provides: "(a) The fees established by this subpart may be waived or deferred in specific instances where good cause is shown and where waiver or deferral of the fee would promote the public interest."

³⁵ Application of Leosat Corporation for Authority to Construct a Low-Earth Orbit Domestic Satellite System, *Memorandum Opinion and Order*, 8 FCC Rcd 668, 670, ¶ 20 (1993).

³⁶ Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd 947, ¶¶ 70, 88 (1987) (applicants must show "extraordinary and compelling circumstances;" "those requesting a waiver or deferral will have the burden of demonstrating that, for each request, a waiver or deferral would override the public interest, as determined by Congress, that the government should be reimbursed for the specific regulatory action of the FCC."); Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, *Memorandum Opinion and Order*, 5 FCC Rcd 3558, 3572, ¶ 31 (1990) ("Commission considers requests for fee waivers on a case by case basis ... when the applicant demonstrates that waiver would be in the public interest"); Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, ¶ 29 (1994) ("Pursuant to section 8(d)(2), we have permitted waivers only on a case-by-case basis following a demonstration that the public interest clearly overrides the private interest of the requester. Thus, in our NPRM, we proposed to restrict similarly waivers to encompass only those requests unambiguously articulating "extraordinary and compelling circumstances" outweighing the public interest in recouping the cost of the Commission's regulatory services from a particular regulatee.").

Financial Hardship

Petitioners assert that their apparent financial hardship establishes good cause.³⁷ In that regard, Petitioners present some financial documentation tending to show that presently they lack adequate financial resources. Because the financial documentation is incomplete, it does not demonstrate financial hardship, and lacking that, Petitioners failed to demonstrate good cause.

The Commission has narrowly interpreted its waiver authority to require a showing of compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs.³⁸ Within that context, a "sufficient showing of financial hardship"³⁹ requires more than "[m]ere allegations or documentation of financial loss, standing alone," rather "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."⁴⁰ For example, in situations where the regulatee seeks a waiver predicated on financial need, the regulatee must provide financial documents including, *e.g.*, a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. Evidence must support the requested relief, and as necessary, we look beyond financial records of the applicant corporation or limited liability company to those of an affiliate, parent, or interest holder. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.⁴¹

Petitioners offered only income statements and balance sheets tending to show that the combined operating expenses greatly exceed combined revenues, the combined liabilities greatly exceed the combined assets, and operating expenses seemingly are funded by officer loans. The *Request* does not include a projected cash flow or any estimates concerning future activities, a business plan, or the details of any proposed financing arrangements. Thus, on the face of the furnished documents, the entities appear to be insolvent;⁴² nonetheless, Petitioners assert, in the context of an anticipated favorable decision on their waiver, they will revise "the initial channelization plan and system design," raise "capital necessary to apply for all available frequencies," develop new equipment for the existing AGRAS system," and act to "[rebuild t]he system infrastructure ... into a modern digital telecommunications system ... at a price that is ... reasonable in view of current cost expectations."⁴³ Petitioners' documentation does not demonstrate financial hardship, and the lofty plans premised on a favorable outcome on the *Request* are without gist.

³⁷ *Request* at 6-7.

³⁸ 2 FCC Rcd 947, ¶¶ 70, 88.

³⁹ 10 FCC Rcd at 12761-62, ¶ 13.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *e.g.*, 28 U.S.C. § 3302.

⁴³ *Request* at 8-9.

We are unable to find that financial hardship will result from paying the fees, especially, as in this case, the entities are already operating in the zone of insolvency, and neither of the entities provides services that generate sufficient revenue to cover annual expenses. Moreover, much of Petitioners' assertions are based on future events, *e.g.*, obtaining capital and expending funds, thus the measure of the impact of paying the fees relates to cash projections and financial documentation in business plans and financial agreements that Petitioners failed to provide. Petitioners failed to provide information necessary to reach the standard of production required by section 1.925.⁴⁴ That relevant information is lacking, and on that ground, Petitioners failed to establish financial hardship.

We note Petitioners are separate legal entities that have disclosed interest holders that include individuals and other legal entities.⁴⁵ The legal doctrine that a corporation or limited liability company is a legal entity separate and apart from the persons composing it is a legal theory subject to the exception that in the appropriate situation, the veil may be pierced, so that the corporate business entity and the individual or individuals owning stock and assets will be treated as identical, and the separate corporate entity disregarded. In such matters, the general rule holds that inadequate capitalization favors disregard of the separate corporate entity. Obvious thin or inadequate capitalization, measured by the nature and magnitude of the corporate undertaking, is a measure in denying stockholders the defense of limited liability.⁴⁶ Indeed state courts have imposed personal liability on owners of thinly capitalized corporations or limited liability companies.⁴⁷ Just as under capitalization provides legal ground to pierce the corporate veil to extend liability, the legal theory allows us to look deeper into the financial status of such an entity. Thus, we apply the principal in the context of the *Request* for the purpose of determining whether Petitioners demonstrated financial hardship. They have not. Instead, the limited financial documentation Petitioners submitted with their *Request* paints a picture of two entities suffering from persistent thin capitalization that is seemingly insufficient to meet even the preliminary goals that Petitioners put forth to demonstrate they met the public interest prong of our standard. Seemingly, the conclusion is that Petitioners' financial resources are rationed according to immediate requirements, rather than to meet the long range goals,⁴⁸ and

⁴⁴ Not only did Petitioners fail to provide the necessary information, but they failed to demonstrate how the underlying purpose of the rule requiring payment of the full application fee is would not be served or would be frustrated by application to the present case, and that a grant would be in the public interest. Nothing unique or unusual was presented, and there no showing that application of the rule would be inequitable, unduly burdensome or contrary to the public interest.

⁴⁵ See *e.g.*, FCC Forms 602, FCC Ownership Disclosure Information for the Wireless Telecommunications Services, File No. 0003443025, SkyTel Spectrum, LLC (disclosing interests by Andrew Fitton, President of the Ultimate Managing Member, Gregory M. Kleinsorgen, United Spectrum Management Services, LLC, and United Wireless Holdings, Inc.) and File No. 0003507019, Stratophone, LLC (disclosing interest by Albert Gencarella, Freepage Corporation/Matt Edwards, Matt Edwards, Space Mark Communications, Inc., and Vincent A. Jodice, Jr.) (collectively, *Interest Holders*).

⁴⁶ See *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ("obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability"); *Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942) (inadequate capitalization ground to disregard the separate existence of a subsidiary from a parent); *American Honda Motor Co., Inc Dealerships Relations Litigation*, 958 F.Supp. 1045, 1051 (D. Md. 1997) (corporate veil can be pierced because of inadequate capitalization of the subsidiary).

⁴⁷ See *e.g.*, *Vuytsteke v. Broan*, 172 Or. App. 74 (2001).

⁴⁸ For example, we see no recorded disposition of the \$42,000 application fees refunded in 2011 by the Commission to Petitioners. Moreover, having reviewed the publicly available Settlement Agreement and Mutual Release between

neither entity would withstand financial stress. Thus, Petitioners' apparent thin capitalization opens the doors behind the two limited liability companies to see financial information from the disclosed interest holders. Because that financial information is also lacking, Petitioners failed to demonstrate the existence of financial hardship.

Next, Petitioners failed to provide any evidence to back the assertions offered to establish that the public interest will be served by the waiver. Petitioners' task was to show "extraordinary and compelling circumstances" that outweigh the public interest in recouping the cost of the Commission's regulatory services.⁴⁹ They failed. For example, Petitioners argue, on one hand, the public interest is served in waiving the fees, because its plans, summarized in the *Request*, will be advanced, but on the other, the public interest will suffer because denying the *Request* will result in delay, inefficiency, and increased cost. Unfortunately, Petitioners failed to provide any documentation supporting either outcome. Instead, Petitioners presented allegations devoid of the detail that would reasonably be forthcoming in common supporting documentation, such as, a comprehensive business plan, a projected 12 to 24 month cash flow, a list of identified willing and capable financiers, a projected financing plan, a stated willingness of shareholders to recapitalize the business entities, or even a cost projection for the incremental steps described generally in the *Request*. Such documentation would include evidence to relieve the Commission from speculating as to the set of circumstances that occur from requiring payment of each application fee in the total of \$150,495.00, to, on one hand, "make it exceedingly difficult for Petitioners to raise the capital necessary to apply for all available frequencies in an efficient and cost-effective manner,"⁵⁰ yet on the other, if the fees are paid, permit Petitioners to nonetheless "proceed on a more incremental schedule, filing applications for a less comprehensive set of channels, resulting in delays, inefficiencies and, ultimately, increased costs."⁵¹

The public interest is served by collecting the established fees, and it is Petitioners' burden to show the waiver is warranted under our standard. Mere assertions that Petitioners will benefit from the result do not meet the standard. Indeed, Petitioners failed to provide any documentation supporting their claim that the obligation to pay application fees hinders Petitioners' ability to raise capital, and then to accomplish their list of stated goals. Instead, and without any supporting evidence, Petitioners ask that we give them an advantage in the market place because they are presently under-capitalized, insolvent, and generate no significant revenue. Thus, Petitioners' assertions of how the public interest will be served by the waiver are, in reality, statements of how the Petitioners will achieve immediate benefits. We collect our fees based on the schedule to recover a portion of the expenses we incur in processing applications, and, as we have said, fee payment does not affect competition or, in this case, capitalization.⁵²

Bell Industries, Inc., Bell Techlogix, Inc., and, among others, Velocita Wireless LLC, United Wireless Holdings Inc., North American Wireless Holdings LLC, and SkyTel Spectrum LLC, we see the need for Petitioners to explain whether events occurred to alter SkyTel's financial status, and thereby result in apparent insolvency.

⁴⁹ Accipiter Communications, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 18239, 18241 (2001).

⁵⁰ *Id.* at 8.

⁵¹ *Request* at 8.

⁵² See Sirius Satellite Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 12551, 12554, ¶ 11 (2003) ("Nor can we accept [applicant's] argument that it should not have to pay the correct fee associated with its application because this will assertedly advantage its competitor. We collect fees based on a schedule established by Congress to recover a portion of the expenses we incur in processing applications. These fees are incidental to system implementation and, as a practical matter, are unlikely to affect marketplace competition. All licensees incur fee -

Petitioners' claim that the cost of the fees will affect its ability to raise the capital does not satisfy the requirement to establish either good cause for waiver or that the waiver is in the public interest. In effect, Petitioners ask the Commission to process applications for 381 additional channels and pass the cost to another, which in these matters is the federal taxpayer base. Petitioners would have us conclude that the United States government and the taxpayer base should assume financial responsibility for Petitioners' fees, and thereby improve Petitioners' ability to attract financing, accelerate Petitioners plans for filing applications, redesign the infrastructure and prepare a system that will be of reasonable cost for the small passenger base that both uses general aviation and requires air-ground communications. Petition has not shown us how this sequence is in the public interest. Indeed, Petitioners left unfilled significant gaps in evidence that would be necessary to show how all steps in the speculative plan will be accomplished, and thereafter, how the plan that Petitioners summarize will result in the actual operation of the proposed service or to produce some measured economic advancement. Currently, Petitioners generate minimal revenue, but incur significant expense. From that, and without a plan for our review, Petitioners ask us to find that waiving the application fees will serve the public interest because it will result directly in the completion of the summarized goals. Both outcomes are speculative, and Petitioners have not shown how the public interest is served. Plainly, Petitioners failed to present evidence demonstrating the existence of extraordinary and compelling circumstances. The lack of such compelling documented evidence showing how the public interest is or will be served by waiving the fees, is an additional ground to deny the *Request*.

Filing Fee

Petitioners' reasons to apply a fee based on a transmitter rather than a frequency are unpersuasive. Petitioners assert that the Fee Filing Guide does not include a separate section for Air-Ground Radiotelephone Service, and the bureau staff advised that the fees for Air-Ground are the same as those for Part 22 Paging and Radiotelephone Service, which is based on a per transmitter basis. Thus, the position in the fee filing guide must mean, in the context of Petitioners' presentation of the legislative history that the fee should be on a per transmitter basis. Further, Petitioners dismisses without analysis the limitation of section 22.817, which requires a carrier to "apply for one ground station communication channel, receive the authorization, construct the station and notify the FCC of commencement of service before applying for an additional ground station communication channel in that area."

filing expenses. [Applicant] is no exception. Moreover, our fee structure is designed such that all licensees who build a particular type of satellite system pay the same fee.").

By bringing the matter to the Commission a second time, Petitioners seemingly attempt to obtain reconsideration of the Bureau's decision on this matter. This precise point was raised and decided in the Bureau's *Licensing Waiver Order*, which stated unambiguously,

We will require Petitioners to include all channels for a particular site on a single application. However, Petitioners must file a formal request for waiver of fees with the Commission's Office of Managing Director ("OMD"). In the absence of an OMD fee waiver, Petitioners will be required to pay the normal per-channel filing fee, notwithstanding the requisite inclusion of multiple channels on a single application. General aviation air-ground licenses are authorized on a per-site and per-frequency basis. Regardless of the methods used in the system's design and implementation, each frequency and site must ultimately be licensed individually.

Licensing Waiver, *supra* at 8589, ¶ 18, n. 64.

The time has expired⁵³ for seeking reconsideration of the decision that ground licenses "are authorized on a per-site and per frequency basis. [E]ach frequency and site must ultimately be licensed individually." Nothing in Petitioners' *Request* alters those facts, and we will not reopen the door on the 2010-decision.⁵⁴ Additionally, we note that Petitioners silence in this matter in response to the Commission's invitation for comments to the air-ground radiotelephone service rules *Notice of Proposed Rule Making*.⁵⁵ Finally, we do not grant waivers on speculative assertions as to what Congress would have or should have done.⁵⁶

⁵³ 47 C.F.R. § 1.104.

⁵⁴ Petitioners' *Request* overstates the background of this matter with broad summaries that "the proper basis for the assessment of filing fees ... has never previously presented an issue" and the "Commission ... allow[ed] and encourage[d] Petitioners to apply for multiple channels per site simultaneously."

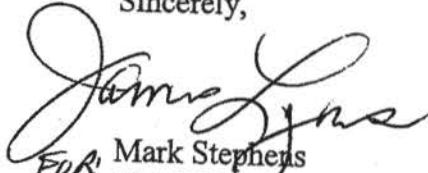
⁵⁵ Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review-Amendment of Parts 1, 22, and 90 of the Commission's Rules, Notice of Proposed Rule Making, 18 FCC Rcd 8380, 8383, ¶ 3, 8408-09, ¶¶ 72-75 (2003).

⁵⁶ Partial Waiver of Application Fees Related to the Transfer of Control of Specialized Mobile Radio Licenses of Nextel Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3126, 3128, ¶ 5 (2000) ("we cannot grant a waiver premised on Nextel's speculative assertion that Congress would have made provision for a reduced fee for SMR licensees had they customarily applied for multiple site stations prior to the time Congress revised the Fee Schedule.").

Messrs. Gencarella and Carper

We deny the *Request*, and because the six month period has now passed, we require payment. We need not address separately whether Petitioners met the standard of demonstrating extraordinary and compelling circumstances for deferment. If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,


FOR Mark Stephens
Chief Financial Officer

Copies furnished:

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